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In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD J. ROWBOTHAM,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page No.

Petition for Writ of Certiorari..... 1

Opinions Below..... 1

Jurisdiction..... 2

Questions Presented..... 2

Constitutional and Statutory Provisions Involved..... 5

Reasons for Granting the Writ..... 8

1. The Trial Court Committed Reversible Error By Failing To Sever Petitioner's Trial From That Of His Co-Defendant When Each Presented Conflicting And Antagonistic Defenses. 8

2. The Trial Court Committed Reversible Error By Denying The Petitioner's Motion for Judgment Of Acquittal..... 11

Conclusion..... 23

Appendix A - (1) Judgment Of The United States Court Of Appeals For The Fifth Circuit..... 25

(2) Order Of The Court Of Appeals Denying Petition for Rehearing..... 27

INDEX (Continued)

		Page No.
Appendix B -	(1) Copy Of Grand Jury Indictment....	28
	(2) Motion For Severance.....	33
	(3) Transcript Containing Oral Motion For Judgment Of Acquittal And Denial Of Motion By Trial Court.....	35

CITATIONS

CASE	Page No.
Ailsworth v. United States, 448 F.2d 439 (9th Cir. 1971).....	21
Baker v. United States, 429 F.2d 1278 (9th Cir. 1970), cert. denied 400 U.S. 957.....	21
Cartwright v. United States, 146 F.2d 133 (5th Cir. 1971).....	20
Causey v. United States, 352 F.2d 203, 207 (5th Cir. 1965).....	13,15
Deluna v. United States, 308 F.2d 140 (5th Cir. 1962).....	9
Direct Sales Co. v. United States, 319 U.S. 703,711 (1943).....	13
Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968) cert. denied 395 U.S. 977 (1969).....	9
Ingram v. United States, 360 U.S. 672, (1958), reh. denied 361 U.S. 856.....	14
Lambert v. United States, 261 F.2d 799, 801 (5th Cir. 1958).....	12
Morissette v. United States, 342 U.S. 246 (1952).....	21
Nelson v. United States, 415 F.2d 483, 485 (5th Cir. 1968), cert. denied 396 U.S. 1060.....	22

CITATIONS (Continued)

	Page No.
Pereira v. United States, 347 U.S. 1 (1954).....	13
Riggs v. United States, 280 F.2d 949, 954 (5th Cir. 1960).....	12
Schaffer v. United States, 362 U.S. 511 (1960).....	8
Spies v. United States, 317 U.S. 492 (1943).....	14
Stevens v. United States, 297 F.2d 665 (10th Cir. 1961).....	20
United States v. Amato, 495 F.2d 545, 549 (5th Cir. 1974).....	13,16
United States v. Bally Manufacturing Corp., 345 F.Supp. 410 (E.D. La. 1972).....	9
United States v. Boyd, 446 F.2d 1267; 1269-70 (5th Cir. 1971).....	21
United States v. Butler, 494 F.2d 1246 (10th Cir. 1974).....	21
United States v. Clutterbuck, 421 F.2d 485-486 (9th Cir. 1970), cert. denied 404 U.S. 858.....	20
United States v. Collins, 464 F.2d 1166 (9th Cir. 1972).....	20
United States v. Crimmins, 123 F.2d 271.272-273 (2d Cir. 1941).....	13,17,19

CITATIONS (Continued)

	Page No.
United States v. Falcone, 311 U.S. 205 (1940).....	22
United States v. Galloway, 448 F.2d 1248 (4th Cir. 1974).....	20
United States v. Gisehaltz, 278 F.Supp. 434, 437 (S.D.N.Y. 1967).....	14
United States v. Horning, 409 F.2d 424 (4th Cir. 1969).....	20
United States v. James, 510 F.2d 546, 552 (5th Cir. 1975).....	12
United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973).....	9
United States v. Lamb, 150 F.Supp. 310 (N.E. Cal. 1957).....	21
United States v. Moore, 505 F.2d 620, 623 (5th Cir. 1974).....	12
United States v. Nall, 437 F.2d 1177 (5th Cir. 1971).....	20
United States v. Noble, 294 F. 689 (D. Mont. 1923), aff'd 300 F. 689 (9th Cir. 1924).....	9
United States v. Reynolds, (Slip Opinion No. 74-2491) 5th Cir. 1975).....	13

CITATIONS (Continued)

	Page No.
United States v. Sheiner, 273 F.Supp. 977, 982-983 (S.D.N.Y. 1967), aff'd 410 F.2d 337, cert. denied 396 U.S. 825, 859	17
United States v. Tyler, 505 F.2d 1329 (5th Cir. 1975)	14,17
United States v. Wilson, 284 F.2d 407 (4th Cir. 1960)	20
United States v. Wilson, 500 F.2d 715, 723 (5th Cir. 1974)	8
United States v. Wolfson, 322 F.Supp. 798 (D. Del 1971), aff'd 454 F.2d 60, cert. denied 406 U.S. 924	9
United States v. Woll, 157 F.Supp. 704, 707-708 (E.D. Pa. 1957)	14,17

STATUTES AND OTHER AUTHORITIES

18 U.S.C. 371	1,4,13
18 U.S.C. 641	1,4,13
18 U.S.C. 922(i)	1,5
28 U.S.C. 1254(1)	2

STATUTES AND OTHER AUTHORITIES (Continued)

	Page No.
Rule 14 Federal Rules of Criminal Procedure	3,8
Rule 29 Federal Rules of Criminal Procedure	4
Developments in the Law - Criminal Conspiracy 72 Harv. L. Rev. 920 (1959)	14

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

NO.

RONALD J. ROWBOTHAM,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Ronald J. Rowbotham, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on October 21, 1975, No. 75-1734, and the denial of the petition for rehearing entered on November 18, 1975.

OPINIONS BELOW

United States District Court for the Southern District of Mississippi: On November 14, 1974, the Petitioner, Ronald J. Rowbotham, was found guilty,by a jury, of conspiracy under 18 U.S.C. 371,to embezzle,steal and convert to his own use,government ammunition of a value in excess of $100.00, and to receive the stolen ammunition,in violation of 18 641,and to transport in interstate commerce stolen ammunition in violation of 18 U.S.C.922(i). On December 11,1974, the Petitioner was sentenced to one year in the custody of the United States Attorney General and to pay a fine in the

amount of $2000.00 by the Honorable Walter Nixon,Judge, United States District Court for the Southern District of Mississippi.

United States Court of Appeals for the Fifth Circuit:On October 21, 1975, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of conviction,however, and remanded the case back to the District Court of resentencing. (See Appendix A, at page 25).

United States Court of Appeals for the Fifth Circuit: On November 18,1975, the United States Court of Appeals for the Fifth Circuit denied the petition for rehearing filed by the Petitioner, Ronald J. Rowbotham. A copy of the Order denying the petition for rehearing may be found in Appendix A, at page 27.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit affirming the conviction of the Petitioner was entered on October 21,1975. The petition for rehearing was denied on November 18,1975,at which time the Court's judgment became final. The jurisdiction of this Court is invoked under the provision of 28 U.S.C. 1254(1).

THE QUESTIONS PRESENTED

1. Did the Trial Court commit reversible error by failing to sever the Petitioner's trial from that of his co-defendant, when each defendant presented not only conflicting, but antagonistic defenses?

2. Did the Trial Court commit reversible error by denying the Petitioner's motion for judgment of acquittal,in that:

A. The Trial Court Judge erroneously applied the "prima facie case" test instead of the "reasonable doubt" test in evaluating and denying the Petitioner's motion for judgment of acquittal.

B. The Government failed to prove, beyond a reasonable doubt, the element of the crime charged in the indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. CONSTITUTION OF THE UNITED STATES:

AMENDMENT FIVE provides in part:
"No person shall . . . be deprived of life, liberty, or property, without due process of law;"

AMENDMENT SIX provides:
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

II. FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 14 of the Federal Rules of Criminal Procedure provides in part:

"If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants in an indictment . . . or by such joinder for trial, together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires."

RULE 29 of the Federal Rules of Criminal Procedure provides in part:
"[t]he court on motion of a defendant . . . . shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses . . . ."

SECTION 371, Title 18, United States Code
"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

SECTION 641, Title 18, United States Code
"Whoever embezzles, steals, purlions, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any depart-

ment or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain,knowing it to have been embezzled, stolen, purlioned or converted ---

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retain, whichever is greater."

SECTION 922(i), Title 18, United States Code

"It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

STATEMENT OF THE CASE

The Petitioner, Ronald J. Rowbotham, and six co-defendants were indicted in one count of a conspiracy, under 18 U.S.C. 371, to embezzle, steal and convert to their own use government ammunition of a value in excess of $100.00, and to receive the stolen ammunition, in violation of 18 U.S.C.

641, and to transport in interstate commerce stolen ammunition in violation of 18 U.S.C. 922(i).

Petitioner is an experienced and license firearms and ammunition dealer who has dealt with all law enforcement agencies on the Mississippi Gulf Coast as a representative of F & B Supply Company of New Orleans, Louisiana. The ammunition alleged to have been stolen was legally being dispensed to local law enforcement agencies along the Gulf Coast from the Naval Construction Battalion Center in Gulfport, Mississippi. The ammunition was "junk ammunition" slated to be destroyed, and was dispensed only for the purpose of providing local Mississippi police departments with ammunition to be used on the practice firing range.

Petitioner Rowbotham and six co-defendants pleaded not guilty to the charges in the indictment. Prior to trial, however, five of the co-defendants changed their plea to guilty, two of whom, Lavinghouse and McDonald, testified for the government. During cross-examination, both Lavinghouse and McDonald admitted that they pleaded guilty for personal reasons, without belief in their own guilt.

The government proceeded to trial against Petitioner Rowbotham and his co-defendant, Kenneth Woodcock, a detective on the Gulfport Police Department. Pretrial, Petitioner moved for a severance which was denied. Woodcock's defense was that he was working undercover in an attempt to catch his fellow police officer McDonald illegally appropriating ammunition from the Seabee base. During the trial, co-defendant Woodcock testified on his own behalf and presented witnesses in defense. The Petitioner offered no witnesses or testimony, his defense being that there could have been no conspiracy to defraud the United States be-

cause the dispensing of "junk ammunition" was authorized, none of the parties had knowledge of any illegality, or any criminal intent.

At the conclusion of the Government's case, the Petitioner Rowbotham moved for a judgment of acquittal contending that the evidence, viewed in the light most favorable to the United States, did not prove beyond a reasonable doubt, the elements of the crime of conspiracy to embezzle and steal property of the United States valued in excess of $100.00, as charged in the indictment. The Petitioner's motion was denied by the Trial Court Judge who applied the "prima facia case" test in evaluating said motion.

The jury deadlocked as to a verdict on co-defendant Woodcock, and the Trial Court declared a mistrial as to him. A verdict of guilty was returned as to Petitioner Rowbotham. He was sentenced to a one (1) year prison term and to pay a fine of $2,000.00. All other co-defendants received suspended sentences and fines.

From his conviction and the sentence imposed, the Petitioner Rowbotham appealed to the United States Court of Appeals for the Fifth Circuit. On October 21, 1975, the Court affirmed the judgment of conviction of the Petitioner, but vacated his sentence and remanded the case back to the Trial Court with instructions to resentence the Petitioner. On October 30, 1975, Petitioner Rowbotham, was resentenced to one (1) year imprisonment and ordered to pay a $500.00 fine, which resentence is presently being appealed to the United States Court of Appeals for the Fifth Circuit bearing docket number 75-4061.

Petitioner Rowbotham filed a petition for rehearing in

the United States Court of Appeals for the Fifth Cirtuit which petition was denied on November 18, 1975. From the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction the Petitioner makes the instant application for issuance of a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW COMMITTED REVERSIBLE ERROR BY FAILING TO SEVER PETITIONER'S TRIAL FROM THAT OF HIS CO-DEFENDANT WHEN EACH PRESENTED CONFLICTING AND ANTAGONISTIC DEFENSES.

Rule 14 of the Federal Rules of Criminal Procedure states in relevant part:

> "If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants in an indictment . . . or by such joinder for trial, together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires."
> . . .

The trial judge "has a continuing duty at all stages of [joint] trial [s] to grant a severance if prejudice . . . appear[s]. *Schaffer v. United States*, 362 U.S. 511 (1960).

The trial court record amply demonstrates that affirmative prejudice was caused by Judge Nixon's denial of a severance, for Rowbotham and Woodcock presented, not only *conflicting* defenses, but defenses that were "antagonistic to the extent that they approached being mutually exclusive." *United States v. Wilson*, 500 F.2d 715, 723 (5th

Cir. 1974). See also, *Gurleski v. United States*, 405 F.2d 253 (5th Cir.1968),cert.denied 395 U.S.977, (1969); *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962); *United States v. Wolfson*, 322 F.Supp.798 (D.Del.1971),aff'd 454 F.2d 60, cert. denied 406 U.S. 924; *United States v. Bally Manufacturing Corp.*, 345 F.Supp. 410 (E.D. La. 1972); *United States v. Noble*, 294 F.689 (D. Mont. 1923), aff'd 300 F.689 (9th Cir. 1924).

Petitioner, Rowbathom's defense, that there could have been no conspiracy to defraud the United States because the dispensing of the "junk ammunition" was authorized and none of the parties had knowledge of any illegality or any criminal intent, was directly contravened by co-defendant Woodcock's defense that a conspiracy did exist and that he was acting as an undercover policeman to thwart it.

The Fifth Circuit recently reversed a denial of a severance by a lower court in a case which was factually similar to the instant case. In *United States v. Johnson*, 478 F. 2d. 1129 (5th Cir. 1973), the Court found appellant, Smith's defense completely antagonistic to his co-defendant, Johnson's defense. Johnson's defense was that he wasn't present when the alleged crime of passing counterfeit bills was committed, whereas Smith's defense was, not a denial of passing the counterfeit bills, but a contention that he didn't pass them with the requisite intent to defraud, "because he was an informer for an Atlanta police detective, . . . [and] lacked the requisite mens rea to violate the statute." *Ibid.*, pps. 1131, 1132.

The Court further elaborated upon the two defendants' theories of defense.

> "Smith's position was thus obvious: he was the good guy - only along for the ride - in order to see that criminals such as White and Johnson were removed from circulation." *Ibid.*, p. 1132.

In the instant case, co-defendant Woodcock's defense was an attempt to illustrate that he, like Smith, in the *Johnson* case, was acting as "his 'own Dick Tracy.' " *Ibid.* Co-defendant Woodcock's counsel laid the foundation for his client's defense by eliciting testimony of undercover procedures, as well as testimony by co-defendant Woodcock's superior officers of his statements concerning the existence of the conspiracy and his role in investigating it. If the jury believed co-defendant Woodcock's defense, it would have been impossible to believe Petitioner Rowbotham's defense.

An additional reason why the two trials should have been severed was that evidence by two prosecution witnesses was completely irrelevant to prove Rowbotham's guilt or innocence. Briefly, these government witnesses testified to statements made by the co-defendant Woodcock to his superior officer concerning the conspiracy and the destination of one rifle allegedly traded for ammunition. The admission of such evidence by the Court added to the confusion of the facts which was caused by the Court's refusal to sever the co-defendants, and served only to prejudice the jury against Petitioner Rowbotham. Certainly, co-defendant Woodcock was the government's best witness against the Petitioner, and the denial of the severance denied the Petitioner of a fair trial and due process of law as guaranteed under the Sixth and Fifth Amendments to the United States Constitution.

For the reasons stated above the trial court erred in re-

fusing to grant Petitioner, Ronald J. Rowbotham, a trial separate from that of his co-defendant, Kenneth A. Woodcock.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL.

Rule 29 of the Federal Rules of Criminal Procedure provides in relevant part:

> "[t]he court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . ."

The trial court judge indicated his incorrect appraisal of the proper test to be used in examining a motion for acquittal. "We are not here concerning the question of reasonable doubt . . . I assume you mean there is not enough evidence to make a prima facie case?" The Fifth Circuit has enunciated a far different test for evaluating such a motion.

> "[T]he question of the defendant's guilt or innocence is for the jury to decide unless the judge, viewing the evidence in the light most favorable to the government, concludes that the jury would necessarily have to have a *reasonable doubt:* if he so concludes, he must grant the motion for acquittal. . .[T]he government . . . must produce evidence which, if believed affords a substantial basis in fact from which the defendant's guilt

> can be inferred." (Emphasis added). *United States v. James,* 510 F.2d 546, 552 (5th Cir. 1975); See also, *United States v. Moore,* 505 F.2d 620, 623 (5th Cir. 1974); *Lambert v. United States,* 261 F.2d 799, 801 (5th Cir. 1958).

The rationale for adherence to this "humane view" is derived from an analysis of the respective functions of the jury and the judge. As expressed by the court in *Riggs v. United States,* 280 F.2d 949, 954 (5th Cir. 1960):

> "[t]he functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration."

It is Petitioner's contention that the evidence submitted by the government, viewed in the light most favorable to the United States, does not prove beyond a reasonable doubt, the elements of the crime of conspiracy to embezzle and steal property of the United States valued in excess of $100.00, as charged in the indictment.

The elements of the crime of conspiracy to embezzle and steal government property valued above $100.00 are comprised in two separate federal statutes - 18 U.S.C. §371 and § 641. The general conspiracy statute makes it a crime for:

> "two or more persons [to] conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and [for] one or more of such persons [to] do any act to so effect the object of the conspiracy. . . ."

The substantive embezzlement and theft felony statute prohibits one from:

> "embezzl[ing], steal[ing], . . . or knowingly convert[ing] to his use or the use of another [or from], without authority, sell[ing], convey[ing] or dispos[ing] of any . . . thing of value of the United States . . ."

In order to justify submission of the government's case to the jury, Petitioner asserts that the prosecution must have proved: an act of agreement and intent to agree, by two or more persons to combine their efforts for an illegal purpose; *Pereira v. United States*, 347 U.S. 1 (1954); *United States v. Reynolds*, (Slip Opinion No. 74-2491) 5th Cir. 1975; knowledge of the existence of, and the objects of the conspiracy by all of the conspirators, *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943); *United States v. Amato*, 495 F.2d 545, 549 (5th Cir. 1974); *Causey v. United States*, 352 F.2d 302, 207 (5th Cir. 1965); *United States v. Crimmins*, 123 F.2d 271, 272-273 (2d Cir. 1941); intent to achieve the

objects of the conspiracy; general intent to do wrong, *U.S. v. Tyler*, 505 F.2d 1329 (5th Cir. 1975); *United States v. Gisehaltz*, 278 F.Supp. 434, 437 (S.D. N.Y. 1967); specific intent to commit the substantive crime which was the object of the conspiracy, *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Woll*, 157 F.Supp. 704, 707-708 (E.D. Pa. 1957); and an overt act in furtherance of the conspiracy which was neither a part of the formation of the agreement nor took place before or after the conspiracy. See also, *Ingram v. United States*, 360 U.S. 672 (1958), reh. denied 361 U.S. 856; *Developments in the Law - Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959).

Taken individually, the United States presented evidence which proved certain of the required elements but which was irrelevant to the proof of other key elements of the conspiracy indictment of the Petitioner.

A. Proof of an Act of Agreement and Intent to Agree.

The government presented evidence showing only an agreement between Petitioner and Eugene McDonald, of the Gulfport, Mississippi Police Department to exchange weapons for ammunition, and an agreement between McDonald and Herman Lavinghouse, the Petty Officer in charge of ammunition, at U. S. Naval Construction Battalian Center in Gulfport, for McDonald to receive junk ammunition for use on police firing and practice ranges. No evidence of an agreement between Petitioner and Petty Officer Lavinghouse was put forth by the government, and in fact, Lavinghouse, as witness for the prosecution, testified that he was unaware of Petitioner Rowbotham's existence while dispensing ammuni-

tion, and that he stopped giving such ammo away when he learned that McDonald was transferring it for purposes other than use on the practice firing range.

Charles A. Sumrall, whom the prosecution quizzed for evidence of an agreement between Petitioner and Julian Blocker to exchange weapons for ammunition, testified to the contrary, that he never saw Petitioner exchange weapons for ammunition.

B. Knowledge of the Existence of, and the Objects of the Conspiracy by the Co-Conspirators, and Intent to Achieve the Objects of the Conspiracy.

The indictment of the Petitioner charges that the object of his conspiracy with others was to commit offenses against the United States, including embezzlement and theft of United States property valued at over $100.00. As the Fifth Circuit Court of Appeals has clearly stated:

> "To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and unequivocal . . . [Though] proof may be circumstantial or direct or both, . . . it must convince beyond a reasonable doubt that a conspiracy existed, [and] that *the defendant knew it.*" (Emphasis added). *Causey v. United States, supra.*

> "The question arises . . . whether [the evidence of defendant's involvement] is sufficient to prove his *intent* to join, or knowledge of the conspiracy. The proof on conspiracy charges, in general, requires: '. . .[Unequivocal k]nowledge that a conspiracy exists.' " *United States v. Amato, supra.*

United States was, and the trial court should have, required to prove that Petitioner had knowledge that the ammunition he received was embezzled or stolen, and was valued at over $100.00. The government clearly did not do this. Petty Officer Lavinghouse testified that he was authorized, at the time, to dispense the junk ammunition to local law enforcement agents for use in training. He testified further that the ammunition was worthless and slated for destruction, and that he knew of no conspiracy to defraud the United States.

Eugene McDonald, who testified as a witness for the government, stated under cross-examination that he could not remember telling Petitioner where the ammunition came from, and he, like Petty Officer Lavinghouse, believed the ammunition to be worthless. that he was authorized to receive it, and that he did not believe the trading of the junk ammunition to the Petitioner to be illegal.

Charles Sumrall, another witness who testified for the government, stated that while he had no personal knowledge of ammunition trading, he would not have thought it to be illegal because the ammunition was bound for destruction.

Finally, Dennis Smith, another witness for the government, testified that McDonald gave such ammunition to anyone who wanted it, that he believed the ammunition would have been destroyed otherwise, that it was common practice for the sheriff's office and department to receive junk ammunition for shooting practice, and that he thought receipt of such ammunition was legal.

How the combination of such prosecutorial evidence could go to prove Petitioner Rowbotham's knowledge of a conspiracy to defraud, embezzle from, and steal from the United States, property worth more than $100.00, is astonishing. None of the co-conspirators testified to such knowledge; they all stated that they believed that the ammunition was valueless, and that its dispensation was authorized. Furthermore, McDonald testified that he never made Petitioner aware of the ammuniton's origins, and he certainly never intimated that his own possession was wrongful.

C. General Criminal Intent and Specific Intent to Commit the Substantive Offense

As one federal court has evaluated the issue:

> "Criminal intent and guilty knowledge [are] essential elements for conviction under [a conspiracy charge] . . . If the defendants' acts were done inadvertantly, mistakenly, or in good faith without an intention to defraud, then the government has not sustained its burden of proof and the defendants must be acquitted." *United States v. Sheiner,* 273 F.Supp. 977, 982-983 (S.D. N.Y. 1967), aff'd 410 F.2d 337, cert. denied 396 U.S. 825, 859.

The Fifth Circuit has also required a showing of intent to agree to do a wrongful act in order to sustain a conspiracy conviction. *U.S. v. Tyler,* 505 F.2d 1329 (5th Cir. 1975) at p. 1332. Justice requires a minimal finding of guilty intent before an adjudication of guilt. Ordinarily,

> "one is not guilty of a crime unless he is aware of the existence of all of those facts which make his conduct criminal. That awareness is all that is meant by the mens rea, the 'criminal intent', necessary to guilt."
> *United States v. Crimmins, supra.*

In the instant case, the government showed no criminal intent by Petitioner, to defraud the United States.

> "[A] specific intent to commit the substantive offense is an inseparable element of the crime of conspiring to defraud the United States . . . [O]ne guilty of conspiracy to defraud the United States must have intended to commit an act or acts which in the context of all the surrounding circumstances constitute a fraud against the United States and necessarily give rise to the inference that the conspirator intended to commit that fraud."
> *United States v. Wol' supra.*

In *Woll, supra,* where defendants were prosecuted for conspiracy to defraud the United States by working privately while under contract to the government, the court stated:

> "[W]hile the Government need not show actual pecuniary loss, . . . it must show that some legitimate government activity has been hampered . . . . It is . . . obvious that [the defendants] . . . had no *intent* to hamper government activity by their conduct, and that such intent cannot be inferred beyond a reasonable doubt from any or

all of the circumstances of their conduct as established at the trial." *Ibid.*

In order to established general and specific criminal intent to defraud the United States of over $100.00 worth of property by embezzlement and theft, the government must have proven Petitioner's knowledge of the existence of facts making his activities illegal. As Justice Learned Hand, in an often quoted statement, ruled:

> "While one may . . . be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes there is a light to run past." *United States v. Crimmins, supra.*

The questions relevant to the issue before this court are therefore: (1) could the Petitioner have conspired to steal property valued over $100.00 when he and his alleged co-conspirators believed that the ammunition was slated for destruction and was worthless to the United States; and, (2) could Petitioner have conspired to steal from the federal government if he and his alleged co-conspirators believed the ammunition to be lawfully distributed?

The government never proved that the ammunition received was, in-fact, worth over $100.00. Petty Officer Lavinghouse attempted to testify as to the ammunition's 'cost-price'. Yet, in a case of similar facts, one federal court considered this measure to be inappropriate.

> "[W]here . . . machine parts have been used by the government to the point where their usefullness has been exhausted; and where they have been discarded and are held for disposal as scrap rather than as classified, segregated parts, they have lost their original identity and have been transformed into scrap. Consequently, the 'cost-price' of the *parts* is irrelevant, since in so far as the government is concerned there is no longer anything to which the 'cost-price' can relate." *United States v. Clutterbuck,* 421 F.2d 485-486 (9th Cir. 1970), cert. denied 404 U.S. 858.

In prosecutions for theft of government property valued at over $100.00, the burden of proving such value is upon the government. See, *United States v. Collins,* 464 F.2d 1166 (9th Cir. 1972); *United States v. Galloway,* 488 F.2d 1248 (4th Cir. 1974); *United States v. Horning,* 409 F.2d 424 (4th Cir. 1969); *Stevens v. United States,* 297 F.2d 665 (10th Cir. 1961); *United States v. Wilson,* 284 F.2d 407 (4th Cir.1960); *Cartwright v. United States,* 146 F.2d 133 (5th Cir. 1944). Every one of the government's witnesses in the instant case, who testified about the ammunition's value, stated that he believed it to be worthless or bound for destruction. The Fifth Circuit recently reversed a conviction for theft of property of a value greater than $5000 because it found the owner's testimony of the property's value insufficient to support the verdict. His own testimony negated the presumed market value of the property. *United States v. Nall,* 437 F.2d 1177 (5th Cir. 1971). Petitioner's conviction for conspiracy to defraud the United States of over $100.00 worth of property should likewise be reversed absent any credible proof of the value of such property.

The specific criminal intent which the United States was required but failed to prove Petitioner had to conspire to

violate 18 U.S.C. § 641 "is the intent to appropriate [the property] to a use inconsistent with the owner's rights and benefits." *Wilsworth v. United States*, 448 F.2d 439 (9th Cir. 1971). Petitioner must have been shown to have known "that the taking [was] wrongful," *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Lamb*, 150 F. Supp. 310 (N.D. Cal. 1957); he must have known that the property was stolen or embezzled. *United States v. Boyd*, 446 F.2d 1267, 1269-70 (5th Cir. 1971); *Baker v. United States*, 429 F.2d 1278 (9th Cir. 1970), cert. denied 400 U.S. 957.

All the government's witnesses, Lavinghouse, McDonald, Sumrall, and Smith all believed that the ammunition was legally dispensed to and by them, at the time of such actions. Their "innocent" knowledge in no way proves Petitioner's guilty knowledge; if anything, their averments of *unknowing* illegality show that Petitioner was under the same misconception. This misconception cannot be deemed criminal intent.

A strikingly similar situation was present in the case of *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974). The defendants had been convicted in the district court of conspiracy to convert government property, specifically, radio and electronic items from a redistribution and marketing facility, which served as a clearinghouse for obsolete or unserviceable Air Force equipment. Air Force personnel were authorized to withdraw needed repair parts for use by their units, and the unusable equipment was eventually sold for salvage value to private buyers. The court reversed the convictions of the defendants on appeal because it found that the defendants *may* have been under the impression that the parts were salvage and that they were not accountable to the

Air Force. The Court maintained that the prosecution was required to prove:

> "that the defendant had knowledge that the property was stolen and that he intended to convert it to his own use or grain . . . If indeed the property was stolen, there is no indication that [defendant] Sergeant Slomkowski knew it . . . The testimony is entirely consistent with his belief that the property had been legitimately obtained. . ." *Ibid.*, page 1253.

The federal government's evidence in Petitioner Rowbotham's case was insufficient to enable the jury to determine beyond a reasonable doubt that he had the requisite general and specific criminal intents to warrant a conspiracy conviction.

D. Overt Act in Furtherance of the Conspiracy.

Petitioner Rowbotham does not take issue with the government's contention that it offered proof that the defendants committed a number of "overt acts," as charged in the indictment. He does however, question whether all six of the purported acts were proved by competent evidence, and most important, whether such acts were committed in furtherance of a criminal conspiracy to defraud the United States. In his previous discussion, Petitioner has outlined his argument that the prosecution failed to prove an agreement to combine efforts *for an illegal purpose.* Thus, any "overt acts" could not have furthered such an agreement. See *United States v. Falcone*, 311 U.S. 205 (1940), and *Nelson v. United States*, 415 F.2d 483, 485 (5th Cir. 1968), cert. denied 396 U.S. 1060.

To summarize the foregoing discussion, Petitioner Rowbotham, urges that this Court reverse his conviction on the ground that the government failed to carry its burden of producing sufficient evidence to justify a jury verdict of guilty beyond a reasonable doubt.

III. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court below, affirming the conviction of the Petitioner, is erroneous. To permit this conviction to stand in light of the record and the evidence introduced at trial, is to ignore the common precepts of justice and due process of law. Therefore, the present Petition for a Writ of Certiorari should be granted.

Respectfully Submitted:

WILLIAM E. RITTENBERG

BARBARA ZIV GREENBAUM

DALE C. WILKS -Counsel of Record
RITTENBERG & WILKS
Attorneys at Law
2-3-4 Loyola Avenue,Suite 819
New Orleans, Louisiana 70112
(504) 523-2939

CERTIFICATE

I certify that a copy of the foregoing application has been served upon the opposing counsel by placing same in the United States Mail, properly addressed, with adequate postage affixed thereto.

DALE C. WILKS

APPENDIX "A"
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 75 - 1734

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

RONALD J. ROWBATHAM,
Defendant-Appellant

Appeal from the United States District Court for the
Southern District of Mississippi

(October 21, 1975)

Before COLEMAN, CLARK and GEE, Circuit Judges.

PER CURIAM:

Rowbatham contends that the court erred in denying a severance of his case from that of the defendant Woodcock, that the government produced insufficient proof of his guilt of a conspiracy to embezzle government ammunition of a value in excess of $100 in violation of 18 U.S.C. § 371, to receive such stolen ammunition in violation of 18 U.S.C. § 641, and to transport in interstate commerce enbezzled ammunition in violation of 18 U.S.C. § 922(i). These contentions are without merit. The judgment of conviction is affirmed. See Local Rule 21.[1]

1. See N.R.B.B. v. Amalgamated Clothing Workers of America, 430 F. 2d 966.

Rowbatham raises a third contention that the trial court erroneously considered Rowbatham's plea of not guilty as a factor militating in favor of a more severe sentence in this case. This contention is based on the court's pre-sentence statement set out below:

> "On the one hand I note that the defendant has no prior criminal record and has been gainfully employed and does have a family. On the other hand, of course, this defendant did not come in and plead guilty, which of course, he was not required to do and will not be, of course, punished because he exercised his constitutional right to plead not guilty, *but nevertheless that is a factor to be considered in this case.*" (Emphasis added).

The sentence imposed is vacated. The case is remanded to the district court with directions to resentence Rowbatham without any consideration of the fact that he pleaded not guilty. By this remand we do not intimate that any particular sentence is required or indicated.

AFFIRMED IN PART AND
IN PART VACATED AND
REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75 - 1734

U.S. Court of Appeals
FILED
NOV 18 1975
EDWARD W. WADSWORTH
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RONALD J. ROWBOTHAM,
Defendant-Appellant

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING
(NOVEMBER 18, 1975)

Before COLEMAN, CLARK and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Southern District of Mississippi
FILED
APR 3 - 1974
Robert C. Thomas, Clerk
By Deputy

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. S74-12(N)

HERMAN DURWOOD LAVINGHOUSE, EUGENE JAMES KENNETH ALGIN WOODCOCK, JAMES LEROY CUNNINGHAM, JAMES JULIAN BLOCKER, ALTON JOE NETTLES and RONALD J. ROWBOTHAM

The Grand Jury charges:

That on or about March 1972 and continuously thereafter up to and including August 1973, in the Southern District of Mississippi, the defendants herein, HERMAN DURWOOD LAVINGHOUSE, EUGENE JAMES McDONALD, KENNETH ALGIN WOODCOCK, JAMES LEROY CUNNINGHAM, JAMES JULIAN BLOCKER, ALTON JOE NETTLES and RONALD J. ROWBOTHAM, unlawfully, willfully and knowingly did conspire and agree together and with Charles A. Sumrall and Albert Earl Santa Cruz, named as co-conspirators but not as defendants, and with other persons to the Grand Jury unknown, to commit offenses against the United States, that is: to knowingly and willfully embezzle, steal, purloin and convert to their own use weapon ammunition, property of the United States of a

value in excess of $100.00, which property had come into the possession and care of defendant Lavinghouse by virtue of his employment as Petty Officer in Charge of Ordnance, U.S. Naval Construction Battalion Center in Gulfport, Mississippi, in violation of Section 641, Title 18, United States Code; to knowingly and willfully receive, conceal and retain stolen and embezzled property of the United States; that is, weapon ammunition of a value in excess of $100.00, with intent to convert the property to their own use, the defendants knowing the property to have been stolen and embezzled, in violation of Section 641, Title 18, United States Code; and to knowingly and unlawfully transport and ship in interstate commerce from Mississippi to Louisiana stolen ammunition, knowing and having reasonable cause to believe the ammunition was stolen, in violation of Section 922(i), Title 18, United States Code;

All in violation of Section 371, Title 18, United States Code.

It was part of the conspiracy that the defendants would embezzle and steal, and receive, conceal and retain weapon ammunition from ammunition bunkers situated at the U.S. Naval Construction Battalion Center, Gulfport, Mississippi.

It was further a part of the conspiracy that the defendants would transport and ship the ammunition from Mississippi to Louisiana.

In furtherance of the unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants committed the following overt acts:

OVERT ACTS

1. On or about January 18, 1973, defendants McDonald and Woodcock obtained a quantity of ammunition from a trailer situated off 28th Street in Gulfport, Mississippi.

2. On or about January 18, 1973, defendant McDonald delivered to defendant Rowbotham at the Buena Vista Motel in Biloxi, Mississippi, a quantity of ammunition, at the same time and place defendant Rowbotham delivered to defendant McDonald a 9 millimeter Smith and Wesson automatic pistol.

3. On or about January 18, 1973, defendant McDonald delivered to defendant Woodcock at his residence in Gulfport, Mississippi, a 9 millimeter Smith and Wesson automatic pistol.

4. On or about February 1973 defendant McDonald delivered to defendant Nettles a quantity of ammunition at defendant Nettles' place of business, C & J Buy and Sell in Biloxi, Mississippi, at the same time and place defendant Nettles delivered to defendant McDonald a pistol.

5. On or about March 26, 1973, defendant Rowbotham delivered to defendant Cunningham a Colt AR 15 rifle.

6. Defendant Lavinghouse, Gunner's Mate, United States Navy, served as Petty Officer in Charge of Ordnance at the Naval Construction

Battalion Center located at Gulfport, Mississippi, and on or about July 10, 1973, he and defendant Blocker loaded a quantity of ammunition from an ammunition bunker at the Seabee Center into Blocker's pickup truck.

Robert E. Hauberg
United States Attorney

A TRUE BILL:

Foreman of the Grand Jury

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

FILED
JUNE 3 1974

UNITED STATES OF AMERICA
VS.
HERMAN DURWOOD LAVINGHOUSE,EUGENE JAMES McDONALD, KENNETH ALGIN WOODCOCK, JAMES LEROY CUNNINGHAM, JAMES JULIAN BLOCKER, ALTON JOE NETTLES, RONALD J. ROWBOTHAM

MOTION FOR SEVERANCE

Comes now the Defendant, RONALD J. ROWBOTHAM, by and through his duly authorized and empowered attorney, Charles E. Morris, Jr., and pursuant to Rule 14 of the Federal Rules of Criminal Procedure, moves this Honorable Court for relief from prejudicial joinder in the instant indictment, and moves that this Honorable Court order that he be tried separately from the other Defendants on this indictment by granting a severance and separate trial from the other Defendants charged herein, and as grounds for this Motion states:

The evidence which will be adduced by the Government to prove offenses under this indictment involves statements and alleged overt acts attributed to this co-defendant which are inadmissible against him and other evidence which is inadmissible against this Defendant but is of such a nature that it will prejudice the jury against this Defendant and deprive him of a fair and impartial trial.

Respectfully submitted,
C.E. MORRIS, JR., Attorney for
RONALD J. ROWBOTHAM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION
Southern District of Mississippi
FILED
JUL 10 1974
Robert C. Thomas, Clerk
Deputy

UNITED STATES OF AMERICA
VS.
RONALD J. ROWBOTHAM
CRIMINAL NO. S74-12(N)

ORDER

This cause coming on to be heard upon the Motion for Severance of the Defendant, Ronald J. Rowbotham, and the Court having heard and considered the same and being fully advised in the premises, it is therefore,

ORDERED that the Motion for Severance of the Defendant, Ronald J. Rowbotham, is hereby denied.

ORDERED this the 9th day of July, 1974.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

EXCERPTS FROM TESTIMONY (Pages 463-469)

BY MR. MORRIS:

Your Honor, comes now Charles E. Morris, Jr., attorney for Ronald J. Rowbotham, and moves this Court to exclude the testimony and the evidence submitted against this defendant and for a directed verdict and would show to the Court that first of all that there is a reasonable doubt that the ammunition was stolen; secondly, that there is reasonable doubt as to the value of the ammunition.

BY THE COURT:

We are not here concerning the question of reasonable doubt, Mr. Morris, if we were, there would be no question but that its a question for the jury. I assume you mean that there is not enough evidence to make a prima facie case?

BY MR. MORRIS:

Yes, sir.

BY THE COURT:

All right.

BY MR. MORRIS:

There is no expert testimony, in fact the only testimony given to this Honorable Court as to the value of any ammunition was by the defendant Lavinghouse, who stated in his opinion it was non-negotiable, that it was not worth a cent. There has been no knowledge that there was anything illegal in the acquisition of any of the surplus ammunition. Lavinghouse was the main operative party who flatly states that

Rowbotham did not conspire, discuss or agree willfully to do anything, in his opinion, illegal. The other witness, Mr. Mc Donald, stated the same thing. May it be known that Mr. Lavinghouse has pled guilty to the charge and under Your Honor's instructions he came in and said that he was guilty and now he wants to say that he's not, and that he was only seeking some leniency and in his opinion there has been no conspiracy. Mr. McDonald said the same thing. And they still contend in their words that they are not guilty of a conspiracy, especially with the defendant Rowbotham. Now, Your Honor, on any crime of this nature, especially conspiracy, the statutes specifically state that there has to be an intent on the part of the defendant to conspire. There has been no evidence before this Honorable Court to show that Mr. Rowbotham ever intended to conspire to commit any of the acts. In fact, all of the witnesses have testified openly that all of their dealings with policemen were done in good faith with policemen, they were done in the normal course of business. The United States Attorney said that Dennis Smith had corroborated everything, Dennis Smith has not corroborated anything. Dennis Smith stated he doesn't know that ammo was traded for guns nor is he sure where it came from. Your Honor, we would respectfully submit that the evidence itself cannot and should not sustain a conviction and should not be submitted to the jury. Thank you.

BY THE COURT:

What says the government?

BY MR. TUCKER:

If the Court please, in addition to those remarks that I made in regard to Mr. DeMetz's motion on Woodcock, I

would add in regard to the defendant Rowbotham, we also have for the jury's consideration testimony of McDonald to the arrangement between he and Mr. Rowbotham, that is, that he got a credit, a cent per round, towards the revolver that he had gotten, towards the revolvers that he got from Rowbotham. In addition we have the testimony of Mr. Smith,who was then a patrolman, that the incident a couple of weeks later when he went by Gene McDonald's house, Mr. Rowbotham drove up at that time in a van in which some eight crates of the ammunition were loaded, Your Honor. Insofar as the value is concerned, Mr. Lavinghouse, who had held that type position for many years, testified that the government cost of those rounds for the type ammunition that we have in evidence started at ten cents a round and went down through, as I remember it, Your Honor, four cents a round for the different types of ammunition that we have and his best judgment was over a hundred thousand rounds involved, taking his testimony alone, if the Court please, we established the value. Taking McDonald's testimony as to the arrangement between he and Rowbotham, we have again established the value. If we take the forty thousand rounds that he said that he delivered himself to Mr. Rowbotham at a cent a round, on that alone, Your Honor, that's four hundred dollars. And then he was involved with another twenty thousand rounds that came through Blocker, and that was another two hundred dollars, so if the Court please, we have also established the value.

BY THE COURT:

Do you want to close your motion?

BY MR. MORRIS:

Your Honor, this indictment does not charge and does

not require, we are not here to ascertain what the value of the ammunition is to Mr. Rowbotham. We have to look at what the value of the ammunition is to the United States Government. That's what we are here to prove. Now what if the ammunition had gone ahead and been destructed at Camp Shelby or fired or whatever, what value could the government have received from that. We are not interested in what the government, that's a bad choice of words, I don't mean interested, but trying to prove, what the government has paid for the ammunition because it is perishable ammunition. There has been no proof offered here that this ammunition was not slated for destruction and that it had any value to the United States Government. Thank you, Your Honor.

BY THE COURT:

The defendants in this case, Lavinghouse and McDonald, who entered pleas of guilty and who testified for the government, the question of their credibility is one for the jury under appropriate instructions. The question is not whether they feel they conspired with anyone or did anything illegal but whether in fact they did so. They both told me under their oaths and their counsel represented also that they fully understood what they were charged with and fully understood the essential elements of the offense, the government would have to prove beyond reasonable doubt before they could be found guilty, that they had been promised nothing except proposed recommendations by the United States Attorney, with the full understanding that the recommendations would not be binding on this Court in any way, and certainly it is not and would not be, and the question of whether or not they now think they are guilty is not of too much import. I found that they voluntarily, knowingly and

understandingly pled guilty, that there was a basis in fact for their pleas and accepted their pleas and adjudged them to be guilty, so as far as that is concerned, that's that. Now, as I stated, the question is not whether they in their opinion, they and/or the defendants here committed a conspiracy in violation of the law or acts pursuant thereto, overt acts, which each one of them are charged with are required to be proven in a conspiracy, if any. But I think that under all the facts and circumstances outlined previously, as stated by me in denying the motion of defendant Woodcock, that the government has proven a prima facie case as against the defendant Rowbotham and has proven value through the testimony of Lavinghouse without objection that the ammunition cost so much per round to the government, and that value has been established sufficiently for the jury to consider. Under all of the circumstances, I feel that the question of the guilt or innocence of the defendant Rowbotham is a question for the jury and I will deny that motion also, his motion to exclude and enter a judgment of acquittal. All right, ready to proceed, gentlemen?

BY MR. DeMETZ:

Your Honor, please, may I request, may I have an idea of how long Your Honor intends to continue this afternoon?

BY THE COURT:

I'm not sure, but I think we will go on until at least six o'clock.

BY MR. DeMETZ:

We are ready to proceed.

(JURY IN AT 4:30 P.M. NOVEMBER 12, 1974)

BY THE COURT:

I will now permit the attorney for the defendant, Woodcock, to make his opening statement to the jury.

Supreme Court, U. S.
FILED
MAR 3 1976
MICHAEL RODAK, JR., CLERK

No. 75-859

In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD J. ROWBOTHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-859

RONALD J. ROWBOTHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court committed reversible error in denying his motions for a severance and an acquittal.

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of one count of conspiracy to embezzle and convert to his own use government ammunition of a value in excess of $100, in violation of 18 U.S.C. 371; to receive this ammunition, knowing it to be stolen, in violation of 18 U.S.C. 641; and to transport it in interstate commerce, having reasonable cause to believe it was stolen, in violation of 18 U.S.C. 922(i).[1] He was sentenced to one

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[1]The indictment also charged six other defendants with the same offenses (Pet. App. 29-32). Five of the co-defendants pleaded guilty. The jury deadlocked as to a verdict on co-defendant Woodcock who, with petitioner, had pleaded not guilty. Subsequent to the court's declaration of a mistrial as to Woodcock, the government dismissed the indictment against him.

year's imprisonment and was fined $2,000. The court of appeals affirmed *per curiam* (Pet. App. 25-26).[2]

The evidence showed that co-defendant Lavinghouse was a United States Navy Petty Officer at the Naval Construction Battalion Center in Gulfport, Mississippi, in charge of ammunition bunkers. He was authorized by the Navy to dispense ammunition, which was suspended from military use and designated to be destroyed, to law enforcement officers of the Gulfport Police Department and the Harrison County Sheriff's Department for official use (Tr. 121-122, 126-128, 153-157).

In mid or late 1972, co-defendant McDonald, a Gulfport police officer, approached Lavinghouse at the naval base and discussed with him the possibilities of obtaining this ammunition. McDonald informed Lavinghouse that the ammunition was to be used for training purposes by the Gulfport police. Acting under this belief, Lavinghouse provided McDonald with 100,000 to 250,000 rounds of government ammunition, over a period of approximately one year (Tr. 123-130, 133-136, 156-157, 159, 162, 174-175, 184-186, 210).

During this period McDonald made arrangements with petitioner, a licensed and experienced gun dealer in New Orleans, Louisiana, to trade the ammunition in exchange for weapons supplied by petitioner (Tr. 133, 187, 206-208, 268-270, 448-449, 585-586, 638). McDonald told petitioner that the ammunition was from the naval base, and they discussed the illegality of selling government ammunition (Tr. 203, 209, 211-212). Petitioner also informed McDonald that the ammunition was being taken to New

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[2] The court of appeals, however, remanded for resentencing because the district court considered petitioner's plea of not guilty to be a factor "militating in favor of a more severe sentence" (Pet. App. 26). Petitioner was resentenced to one year's imprisonment and a $500 fine (Pet. 7).

Orleans, Louisiana, for sale to the New Orleans Police Department. On at least one occasion McDonald hauled approximately 75,000 rounds of the ammunition to a gun dealer in Louisiana (Tr. 206, 217, 235-236, 273, 544, 593).

During the period of the conspiracy, petitioner traded at least seven weapons with McDonald in exchange for approximately 60,000 rounds of the naval ammunition (Tr. 191-204, 208, 215-216, 219, 228-230, 323-328). On one occasion, petitioner received ammunition from McDonald, in return for a pistol which was delivered by McDonald to co-defendant Woodcock (Tr. 321-322).

In March 1973, when there was a possibility of an investigation by the Navy regarding ammunition missing from the naval base, petitioner instructed McDonald not to incriminate anyone in regard to the missing ammunition and made a veiled threat against McDonald's life (Tr. 212-215). McDonald ceased trading the ammunition to petitioner in May 1973 (Tr. 216-217).

In addition to trading with McDonald, petitioner also exchanged weapons for the naval ammunition with co-defendant Blocker. Blocker, who was in the Navy and was also a member of the Harrison County Sheriff's Department, obtained 50,000 rounds of ammunition from the naval base by misrepresenting that the ammunition was to be used by the Sheriff's Department (Tr. 131-132, 137-138, 274-275, 282, 542, 556). On one occasion in March, 1973, petitioner delivered five semi-automatic rifles to Blocker and other people at an apartment rented by petitioner in Gulfport, Mississippi in return for naval ammunition (Tr. 277-278, 283-284, 294, 301-303, 307, 570-573).

Petitioner did not present evidence on his own behalf, or testify, but relied on cross-examination of witnesses and on co-defendant Woodcock's testimony in an attempt

to show that he was not involved in a conspiracy. Woodcock's defense was that he was working undercover to catch McDonald, his fellow police officer, illegally appropriating ammunition from the naval base. Woodcock did not claim that petitioner was involved in McDonald's activities (see discussion *infra*, p. 6).

1. Petitioner contends that the district court erred in denying his motion for a judgment of acquittal.

a. To grant such a motion, the court "must find that when viewed in the light most favorable to the government, the evidence is such that a reasonable juror *must* have a reasonable doubt as to the existence of any of the essential elements of the crime." *United States* v. *Peterson*, 509 F.2d 408, 411 (C.A. D.C.) (emphasis in original; foot omitted); Accord, *e.g.*, *United States* v. *James*, 510 F.2d 546, 551-552 (C.A. 5); *United States* v. *Figueroa-Paz*, 468 F.2d 1055, 1058 (C.A. 9). Although the court couched its standard for review of petitioner's motion in terms of a "prima facie case" (Tr. 463),[3] the court's assessment of petitioner's motion (Tr. 459-462; see also 467-469) shows that the court properly denied it. In any event, viewed in the light most favorable to the government (*Hamling* v. *United States*, 418 U.S. 87, 124; *Glasser* v. *United States*, 315 U.S. 60, 80), the evidence was clearly sufficient to support petitioner's convictions.

The government proved that petitioner met with co-defendants McDonald and Blocker and others for the express purpose of trading weapons for the naval ammunition. Petitioner contends that he believed the

[3] In response to petitioner's motion for judgment of acquittal, the court stated (Tr. 463):

> We are not here concerning the question of reasonable doubt, Mr. Morris, if we were, there would be no question but that its a question for the jury. I assume you mean that there is not enough evidence to make a prima facie case?

ammunition was legally dispensed, and thus he did not have the necessary intent to enter into a conspiracy. This claim is refuted by the record, which shows that petitioner was an experienced dealer in firearms and ammunition who knew the source of the ammunition. Moreover, McDonald discussed with petitioner the illegality of selling government ammunition, and petitioner instructed him not to incriminate anyone when there was a possible investigation of the missing ammunition. This, combined with the circumstances attending the trading of the ammunition and weapons, warranted the jury's rejection of the implausible defense offered by petitioner.

b. Petitioner's claim that the government failed to prove that the ammunition had a value exceeding $100 is also without merit (Pet. 15-16, 19-21). Proof of a violation of 18 U.S.C. 641 is not dependent on the value of the property. Value is significant only with respect to the sentence, which is limited to one year's imprisonment and a fine of not more than $1,000 if the value is under $100 (see, *e.g.*, *United States* v. *Devall*, 462 F.2d 137, 142 (C.A. 5); *United States* v. *Lacario*, 431 F.2d 1182, 1184 (C.A. 9); *Montgomery* v. *United States*, 403 F.2d 605, 610 (C.A. 8), certiorari denied, 396 U.S. 859. Petitioner's sentence upon remand was within these limits. In any event, the government proved that the value of the ammunition was over $100 when it established the "market value" and "cost price" of the ammunition (Tr. 139, 176-177, 187, 207-208, 217-218, 268, 270).

2. The district court did not commit reversible error in denying petitioner's pretrial motion for severance. The decision whether to sever is within the sound discretion of the district court. *Schaffer* v. *United States*, 362 U.S. 511; *Opper* v. *United States*, 348 U.S. 84, 95; Rules 8(b), 14, Fed. R. Crim. P. It is not an abuse of such discretion to deny severance prior to trial where, as here, "there was no

mutual exclusivity among the defense, i.e., nothing to indicate that 'if one defense were believed, the other[s] could not be' ". *United States* v. *Addonizio*, 451 F.2d 49, 63 (C.A. 3), certiorari denied, 405 U.S. 936.

Woodcock made no attempt to implicate petitioner or shift culpability to him. Rather, Woodcock consistently maintained that he developed no evidence implicating petitioner (Tr. 538, 574-575, 579, 588-590, 597-598, 605, 640, 653, 658). Furthermore, there was no confrontation problem, since Woodcock testified, and was subject to cross-examination.[4]

Under these circumstances, the motion for severance was properly denied, and the court's admonitory instructions sufficiently segregated the co-defendants so that an intelligent verdict could be rendered as to each (Tr. 925, 927-928).[5]

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[4]Petitioner also failed to renew his motion for severance at any time during trial, which ordinarily constitutes a waiver of the motion for severance. See, *United States* v. *West*, 517 F.2d 483, 484 (C.A. 8); *United States* v. *Figueroa-Paz*, *supra*, 468 F. 2d at 1057.

[5]Petitioner's reliance on *United States* v. *Johnson*, 478 F.2d 1129 (C.A. 5) (Pet. 9-10), is misplaced. In *Johnson*, a defendant's defense was that he did not participate in the passing of counterfeit federal reserve notes. However, this contention was completely antagonistic to the defense of a co-defendant, who claimed to have committed the crime in his capacity as an undercover police officer, and made a confession directly incriminating the defendant. Furthermore, the co-defendant's counsel in closing argument had "no qualms about casting [the defendant] as the major culprit in the counterfeit transaction" (478 F. 2d at 1133), and the evidence of defendant's involvement, independent of co-defendant's confession, was insufficient to support defendant's conviction.

Petitioner's claim of prejudice because of the possible spillover effect of evidence introduced against Woodcock (Pet. 10) does not show a probability of actual prejudice justifying reversal. See, *Woodcock* v. *Amaral*, 511 F. 2d 985, 993-995 (C.A. 1), certiorari denied, October 6, 1975, No. 74-1652; *United States* v. *Jenkins*, 496 F. 2d 57, 70-71 (C.A. 2), certiorari denied, 420 U.S. 925.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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